IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-156

THE VENDO COMPANY, a Missouri corporation,
Petitioner,

vs.

LEKTRO-VEND CORP., a Delaware corporation,
HARRY B. STONER and
STONER INVESTMENTS, INC., a Delaware corporation,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION

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May It Please The Court:

Respondents respectfully file this Brief in Opposition to the Petition for a Writ of Certiorari.

NOTE: Pet. refers to the Petition of Petitioner
Pet. App. refers to pertinent pages in the Appendices to the Petition
Resp. App. refers to pertinent pages in the Appendices to Respondents' Brief in Opposition
Stoner Inv. refers to Stoner Investments
Emphasis supplied throughout unless noted otherwise

QUESTIONS PRESENTED

(1) Whether Section 16 of the Clayton Act "expressly authorizes" issuance of an injunction against the collection of state court judgments, within the meaning of the Anti-Injunction Statute, 28 U.S.C. §2283, where the procurement and enforcement of those judgments were part and parcel of an anticompetitive scheme which violated federal antitrust laws and collection thereof would thwart the trial of federal antitrust treble damage claims.

(2) Whether an injunction against the collection of state court judgments is "necessary in aid of [the] jurisdiction" of a United States District Court, within the meaning of the Anti-Injunction Statute, 28 U.S.C. §2283, where the procurement and enforcement of said judgments were part and parcel of an anticompetitive scheme which violated federal antitrust laws and collection thereof would eliminate two federal antitrust plaintiffs and severely limit the ability of the third plaintiff to effectively prosecute this action.

(3) Whether the injunction at bar offends principles of comity and federalism.

(4) Whether the Court below reversed, reviewed or revised a decision of the Illinois Supreme Court so as to justify an exercise of this Court's supervision.

ADDITIONAL STATUTES INVOLVED

Petitioner omits (Pet. 2-3) Sections 1 and 2 of the Sherman Antitrust Act (15 U.S.C. §§1, 2) and Section 4 of the Clayton Act (15 U.S.C. §15), which are set out in pertinent part in Appendix A.

STATEMENT OF THE CASE

Petitioner's "Statement of the Case" (Pet. 3-10) omits material facts and contains inaccuracies. Respondents therefore respectfully submit the following Statement of the Case.

Preliminary

Count I of Respondents' Amended & Supplemental Complaint charged, and on the evidence the District Court found, that Petitioner was guilty of anticompetitive conduct violative of §§1 and 2 of the Sherman Act. Part of that anticompetitive conduct was the use of Illinois courts by Petitioner to harass Respondents. This abuse of the judicial process culminated in the affirmance by the Illinois Supreme Court of a judgment for $170,835 against Stoner individually and another judgment for $7,345,500 against both Stoner and Stoner Investments ("Stoner Inv.").

Petitioner took immediate steps to enforce those judgments and collected $582,126.09 which had been held in an Escrow Trust. Further collection threatened to strip Stoner and Stoner Inv. of their assets, which included the controlling stock in the third Respondent, Lektro-Vend, Petitioner's competitor, thus eliminating two Respondents and severely limiting the ability of the third to effectively prosecute the antitrust complaint at bar. Respondents then moved for a preliminary injunction to stay the enforcement of the state court judgments pending a hearing of their antitrust case.

The District Court issued a preliminary injunction, finding that the Respondents had demonstrated the likelihood

of ultimate success on the merits of their antitrust claims; that the balance of equities favored Respondents; that they would suffer irreparable harm if Petitioner were to continue its efforts to collect its state court judgments; that the paramount national interest in protection of competition required court intervention; that the failure to issue the injunction would deprive the Court of full and effective jurisdiction of the antitrust claims and that relief was necessary to protect the jurisdiction of the Court. *The injunction contained detailed provisions protecting the liens of the judgments and regulating the conduct of the judgment debtors during the pendency of the injunction* (Pet. App. 36-45).

On appeal, this injunction was unanimously affirmed by the Court of Appeals (Pet. App. 1-17), and Vendo's Petition for Rehearing with Suggestion for Rehearing *En Banc* was denied (Pet. App. 18).

The Findings Of The District Court As To Petitioner's Anticompetitive Conduct

The District Court found that Respondents "have placed considerable evidence in the record demonstrating illegal anticompetitive behavior on the part of Vendo" (Pet. App. 35). Petitioner attempted unsuccessfully to overturn the findings of the District Court in the Court of Appeals (See *Id.* 14-16), but it does not challenge them here. Rather, Petitioner's Statement virtually ignores the District Court's findings. They are material to the issues Petitioner raises. Accordingly we are compelled to state them.

(1) Petitioner's Anticompetitive Practices In The Vending Machine Industry

Petitioner's Statement omits that, within the increasingly concentrated vending machine market (Pet. App. 28), it maintained a significant market share (Pet. App. 29); "used litigation as a method of harassing and eliminating competition" (*Id.*);* pursued "a uniform policy of extracting broad covenants not to compete" (*Id.*); and "maintained an aggressive acquisition program to buttress its product line and market share" (*Id.*).

(2) Petitioner's 1959 Acquisition Of Stoner Mfg. Co. And Employment Of Stoner

Among its acquisitions was Petitioner's 1959 purchase of the assets of Stoner Manufacturing Corp. (now Respondent Stoner Inv.) which was the "genesis" of this case (Pet. App. 21). Petitioner's purpose was in part the "*elimination of Mr. Stoner as a potential competitor* in the vending machine market" (*Id.*). The required Federal Trade Commission approval was secured by Petitioner's "[a]pparently . . . *misrepresenting* to the Commission that Stoner Manufacturing and Vendo were not actual or potential competitors [whereas] at the least Vendo was a potential competitor of Stoner Manufacturing" (*Id.* n.3).

Also omitted from Petitioner's Statement are findings that Petitioner extracted from Stoner and Stoner Inv. "overly broad" covenants not to compete, whose "object (and effect) were primarily directed at the elimination of competition rather than protection of good will" (Pet. App.

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* That is, in addition to its state litigation against Stoner and Stoner Inv.

21, 26-7); that contrary to Petitioner's representations to Stoner before the 1959 closing, "Mr. Stoner was virtually ignored or bypassed by the Vendo management [which] admittedly was thus only paying Mr. Stoner not to compete rather than employing him for performance of actual services" (*Id.* at 22, 27); and that "Stoner's position as a director was dependent on . . . the anticompetitive agreements [and] clearly was not intended to create additional duties" (*Id.* at 27-8).

(3) Petitioner's Refusal To Release Stoner Or To Terminate Him In Connection With The Lektro-Vend Venture

The District Court further found, and Petitioner omits, that in December, 1962, Stoner sought a release from his Vendo contract so that he could invest in the manufacture and sale of the new Lektro-Vend machine. But Petitioner refused (Pet. App. 22), even though Stoner "apparently was never called upon to perform significant services for Vendo" (*Id.* 27). Moreover, although Vendo had been "well aware" of Stoner's financial aid to the Lektro-Vend project "as early as [October] 1962" (*Id.* at 22-3), it "refused to terminate his employment as the contract allowed . . . in an attempt to limit Mr. Stoner's activities for the full planned term [10 years] of the post-employment [non-competition] agreement" (*Id.* at 27).

And Petitioner also ignores the finding that when Vendo requested Stoner to help it purchase the Lektro-Vend machine from its inventors, Petitioner declined to purchase the machine because it "thought [the] price too high . . ., that there were inherent technical problems in the Lektro-Vend and that it was too costly to produce." And this was despite Stoner's warning to Petitioner that it "was a serious mistake not to purchase the Lektro-Vend" (*Id.* at 22-3).

(4) Petitioner's State Court Litigation Against Stoner And Stoner Investments

After Stoner's employment with Petitioner expired in June, 1964, he became publicly affiliated with Lektro-Vend Corp. In March, 1965, Stoner sent a letter to the trade seeking to allay rumors (reportedly circulated by Petitioner's salesmen) that Lektro-Vend would soon founder (Pet. App. 23). Petitioner then filed its state court lawsuit against Stoner and Stoner Inv. in August, 1965. The District Court expressly stated (*Id.*):

> "The Court proposes to examine these proceedings *only* insofar as they may reflect illegal anti-competitive conduct by Vendo."

a. The First Trial And Appeal

Petitioner's initial complaint charged only breach of the non-competition covenants in the 1959 sale and employment agreements by reason of aid to Lektro-Vend. In January, 1966, Petitioner added a charge that its trade secrets (vending machine designs) had been misappropriated for Lektro-Vend's benefit. The *ad damnum* was raised from $500,000 to $1,500,000, and injunctions barring further aid to Lektro-Vend for the duration of the non-competition covenants—until July, 1969—were also sought. Upon trial, judgments were entered against Stoner for $250,000 for violation of the covenants and against both Stoner and Stoner Inv. for $1,100,000 for theft of trade secrets (Pet. App. 23-4).*

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* Contrary to the Petition (Pet. 6 fn.), the only "misconduct" upon which the trial court's judgment could have been predicated was Stoner's claimed breach of the covenants and theft of trade secrets, which were the only theories pleaded, as the District Court found (Pet. App. 23-4), which finding the Court of Appeals af-

(footnote continued on following page)

On appeal, the Illinois Appellate Court reversed, holding that Petitioner never had a trade secret, let alone that Stoner stole one (*Vendo* v. *Stoner,* 105 Ill. App. 2d 261, 278-81; 245 N.E. 2d 263, 271-73 (2d Dist. 1969)). Here the District Court found (Pet. App. 24):

> "It is clear from all the evidence that *Vendo should have known that there was no theft of a trade secret;* indeed, the first Illinois Court of Appeals decision demonstrates that the effort by Vendo to prove theft of a trade secret amounted to vexatious litigation."

The $250,000 judgment was also reversed, the Appellate Court holding that salary should be forfeited *only for the period when Stoner was in breach of his covenant* (105 Ill. App. 2d at 288-90; 245 N.E. 2d at 277). The covenants not to compete were held valid under Illinois law and Stoner and Stoner Inv. liable for breach thereof (105 Ill. App. 2d at 281-87; 245 N.E. 2d at 273-76), and the case was remanded with directions for further hearing *only* as to "the extent of [the] damages" Vendo suffered by reason of Stoner's wrongful competition through the instrumentality of Lektro-Vend in violation of the covenants not to compete (105 Ill. App. 2d at 291; 245 N.E. 2d at 278). Vendo was denied leave to appeal.

b. The Second Trial And Appeal

Before the second trial, the trial judge refused to reinstate a state antitrust defense and counterclaim which were

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firmed (*Id.* at 6-7 n.4), and which the first Illinois Appellate Court opinion clearly shows (105 Ill. App. 2d 261, 278-92; 245 N.E. 2d 263, 271-79 (2nd Dist. 1969). Nor were the two money judgments upon "alternative grounds" (Pet. 6 fn.). The $250,000 was a forfeiture of salary for breach of the covenants, and the $1,100,000 was for theft of a trade secret (Pet. App. 24).

previously stricken. Stoner and Stoner Inv. then moved to withdraw their federal antitrust defense without prejudice.* There being no objection from Vendo, the motion was allowed (Resp. App. 2).

Vendo again raised the *ad damnum,* this time to $7,345,500, and attempted to prove what the District Court found was "the *entirely new theory* that Stoner was legally at fault for Vendo's failure to have a FIFO" (first in—first out vending machine), that is, the new Lektro-Vend machine (Pet. App. 24). On this new theory, the trial court entered judgments against Stoner and Stoner Inv. for $7,345,500, and against Stoner alone for $170,835, representing forfeiture of salary prorated to the period in which he breached the covenant.

Upon the second appeal, Stoner's salary forfeiture was affirmed but the $7,345,500 judgment was reversed because the trial court disobeyed the mandate for measurement of damages and also because the evidence at both trials showed that Stoner was not responsible for Vendo's failure to have FIFO (*Vendo* v. *Stoner,* 13 Ill. App. 3d 291, 293-94; 300 N.E. 2d 632, 634-35 (2d Dist. 1973).)

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* In an opinion denying summary judgment in this case, dated June 1, 1971, District Judge McGarr (before whom the case was then pending) stated:

> "Counsel for the plaintiffs have recently brought to our attention the fact that they have withdrawn their federal antitrust defense in the state court. *This was undoubtedly done in consideration of this court's expressed reluctance to consider the cause of action here while the same issue was pending between the same parties in the state court case."*

c. The Illinois Supreme Court Judgment

Upon appeal by both parties to the Illinois Supreme Court, the second Appellate Court decision was reversed and the $7,345,500 judgment entered in the trial court was reinstated. The $170,835 salary forfeiture was affirmed. The Court did not decide whether the covenants not to compete upon which Vendo sued were void and unenforceable under Illinois law. Instead, it predicated liability on the basis of Stoner's breach of fiduciary duty as an officer and director of Petitioner amounting to diversion of a corporate opportunity (*Vendo* v. *Stoner,* 58 Ill. 2d 289, 303; 321 N.E. 2d 1, 9 (1974)—a theory of recovery which was "different . . . [than] had been asserted by Vendo" throughout the state litigation (Pet. App. 7 n.4, 15, 22).

But in any event, as the Court of Appeals noted (*Id.* 15), the District Court specifically found that the Illinois Supreme Court judgment, though cast in terms of corporate opportunity, nonetheless depended on the unlawful intent and effect of the noncompetition covenants when viewed in light of the total circumstances surrounding the creation of the 1959 agreements (*Id.* 27-28).

(5) The District Court's Findings That The State Proceedings Were Part Of Petitioner's Antitrust Violation

Contrary to Petitioner's assertion (Pet. 9 fn.), which strains credulity, the District Court most certainly *did* find that collection of the state court judgments would further a violation of the antitrust laws. It examined the state court proceedings "for the purpose of determining whether Vendo prosecuted those cases as part of an anti-competitive scheme" (Pet. App. 25), adding a footnote that the "Illinois Supreme Court opinion makes such a review imperative"

because "[p]laintiffs, having never had a trial on this issue, must be heard in the only forum now available" (*Id.* n.4).

It found that "the effort by Vendo to prove theft of a trade secret amounted to vexatious litigation" (Pet. App. 24); that "the corporate opportunity theory relied on in the final state court decision cannot either in logic or as a matter of federal antitrust law be separated from the anticompetitive intent and effect of the covenants" (*Id.* 27); that "[t]here is persuasive evidence that Vendo's activities in its litigation against the Stoner interests in Illinois state court were not a genuine attempt to use the adjudicative process legitimately" (*Id.* 30); that the Petitioner prolonged Stoner's employment for the full term so as to maximize the period for which the covenants would run (ten years), and that "[t]he purpose of this portion of the state litigation seems *purely* anticompetitive" (*Id.* 30). These are but some of its findings (*Id.* 26-31). *The District Court specifically held "that §2283 authorizes an injunction here where the state court proceedings are part of the anticompetitive scheme"* (*Id.* 33-34).

The Proceedings Below

Stoner and Stoner Inv. filed a petition for rehearing before the Illinois Supreme Court claiming, *inter alia,* that the Court's decision had violated federal due process guarantees. This petition was denied on November 27, 1974. On December 9, 1974, a stay of execution pending application for certiorari was denied. A writ of certiorari was applied for and denied (420 U.S. 975).

Petitioner had commenced collection proceedings in December, 1974; on January 10, 1975, it collected $582,126.09 from an Escrow Trust. Its further proceedings threatened a takeover of Stoner Inv., the controlling stockholder and

largest creditor of Lektro-Vend Corp., and also threatened to strip the third Respondent, Stoner, of his assets. Respondents accordingly moved for a preliminary injunction on January 23, 1975.

A trial was held on the motion for preliminary injunction from February 10, 1975 through February 14, 1975. After briefing, the District Court issued its Memorandum Opinion and Order on May 29, 1975 (Pet. App. 19-35), holding that it had jurisdiction to enjoin Vendo from further collection activities based upon the first two exceptions set forth in the Anti-Injunction Statute, 28 U.S.C. §2283. The District Court further held that principles of comity and federalism did not bar the injunction "considering the peculiar nature of this case," namely, that the "federal action here is based in part on the very proceeding sought to be enjoined" (Pet. App. 34).

The Court of Appeals affirmed the District Court on May 28, 1976. The Court of Appeals did not reach the second ("in aid of jurisdiction") exception to the Anti-Injunction Statute, 28 U.S.C. §2283, since it upheld the District Court on the basis of the first ("expressly authorized") exception (Pet. App. 8). It also affirmed as to comity and federalism, quoting what the District Court said about "the peculiar nature of this case" (Pet. App. 14). Petitioner's contention that Respondents had not demonstrated a likelihood of ultimate success was rejected (*Id.* 14-15). So were its contentions that laches, waiver and collateral estoppel barred the injunction, because they were not raised below and were "without merit" (*Id.* 16). Nonetheless, Petitioner still pursues its "waiver" contention, arguing that injunctive relief was barred by Stoner and Stoner Inv.'s withdrawal of their federal antitrust defense, without prejudice, in the state proceedings (Pet. 8, 10, 11, 20-22, 23).

ARGUMENT

I.

THE DISTRICT COURT HAD JURISDICTION TO ISSUE THE PRELIMINARY INJUNCTION. THE INJUNCTION WAS BOTH "EXPRESSLY AUTHORIZED" BY SECTION 16 OF THE CLAYTON ACT AND "NECESSARY IN AID OF" THE COURT'S JURISDICTION WITHIN THE MEANING OF THE ANTI-INJUNCTION STATUTE, 28 U.S.C. §2283.

Petitioner's argument that the District Court had no jurisdiction to issue the preliminary injunction completely ignores "the peculiar nature of this case," namely, that it "is based *in part* on the very proceeding sought to be enjoined" (Pet. App. 34). Having examined that state proceeding "for the purpose of determining" whether it was "prosecuted . . . as part of an anticompetitive scheme" (*Id.* 25), the District Court held that it was (*supra* pp. 10-11). It said:

> ". . . the final state court decision cannot either in logic or as a matter of federal antitrust law be separated from the anticompetitive intent and effect of the covenants" (Pet. App. 27),

and that "If federal law is violated by continuation of the state court action the paramount national interest requires court intervention" (*Id.* 34).

In affirming, the Court of Appeals quoted this latter language with approval (Pet. App. 14), also saying:

> "Here Vendo seeks to thwart a federal antitrust suit by the enforcement of state court judgments which are alleged to be the very object of antitrust violations" (*Id.* 11).

Of the cases Petitioner marshalls, not one even remotely resembles the facts of this case or negates these principles laid down by the District Court and affirmed by the Court of Appeals.

Petitioner would reverse a preliminary injunction which prohibits it, *pendente lite,* from obtaining the fruits of its illegal objective, namely, an objective which violated the antitrust laws, as the District Court found *from the evidence* (*supra* pp. 10-11). And this despite ancient law that if the objective is illegal, it cannot be accomplished by lawful means (*Aikens* v. *Wisconsin,* 195 U.S. 194, 205-6 (1904), *per* Holmes, J.), even if one of those means, as here, is recourse to litigation. See, *e.g., California Motor Transport Co.* v. *Trucking Unlimited,* 404 U.S. 508, 515 (1972). Moreover, the presumably lawful means employed was itself illegal. The District Court said:

> "There is persuasive evidence that Vendo's activities in its litigation against the Stoner interests in Illinois state court were not a genuine attempt to use the adjudicative process legitimately,"

setting out that evidence (Pet. App. 30), as well as noting other "evidence that Vendo used litigation as a method of harassing and eliminating competition" (*Id.* 29).

A. The Jurisdiction Of The Federal Courts To Adjudicate Federal Antitrust Treble Damage Claims Is Exclusive And Untrammeled.

In *Lyons* v. *Westinghouse Electric Corp.,* 222 F.2d 184, 189 (2d Cir. 1955), *cert. denied sub nom. Walsh* v. *Lyons,* 350 U.S. 825 (1955), Judge Learned Hand described the exclusive character of federal jurisdiction in private actions to enforce the antitrust laws, as follows:

> "In the case at bar it appears to us that the grant to the district courts of exclusive jurisdiction over the action for treble damages should be taken to imply an immunity of their decisions from any prejudgment elsewhere; at least on occasions, like those at bar, where the putative estoppel includes the whole nexus of facts that make up the wrong . . . There are sound reasons for supposing that such recovery should not be subject to the determinations of state courts. . . . Obviously, an administration of the Acts, at once effective and uniform would best be accomplished by an untrammeled jurisdiction of the federal courts."

The Court then held that plaintiff's treble damage action was not impaired by a state court's prior finding that the alleged antitrust violation, which had been raised by way of defense to the state action, was neither sustained nor established.

If state court determinations of federal antitrust issues are not binding upon federal courts in treble damage cases, certainly state court decisions based upon local law can have no greater effect. This Court said in *Schine Chain Theatres* v. *United States,* 334 U.S. 110, 119 (1948):

> "It is not enough that the agreement may be valid under local law. Even an otherwise lawful device may be used as a weapon in restraint of trade or in an effort to monopolize a part of trade or commerce. Agreements not to compete have at times been used for unlawful purposes."

The Ninth Circuit said in *Twentieth Century-Fox Film Corp.* v. *Winchester Drive-In Theatre,* 351 F.2d 925, 928 (1965), *cert. denied,* 382 U.S. 1011 (1966):

> "State law cannot be permitted to impede the effectuation of the national objectives expressed in the statutory scheme of the antitrust laws."

And in *Mach-Tronics, Inc.* v. *Zirpoli,* 316 F.2d 820, 830, 832, 834 (9th Cir. 1963), it also said:

> "We have noted here the congressional policy to entrust to the federal district courts the determination of questions of fact and law in treble damage suits brought pursuant to §15. We think it to be a part of our function to see that this policy, entrusted to the courts, is not frustrated or abandoned."

Here Petitioner insists that its anticompetitive devices were held lawful under local law in a final decision of the Illinois Supreme Court (Pet. 10, 23). *Ergo,* it urges, "the matter should have rested there" (*Id.* at 23). Petitioner thus overlooks that the question is one of federal law, which governs and which has been decided adversely to it, namely, that its anticompetitive devices violated federal antitrust law (Pet. App. 27-28). At bar the issue is whether the "untrammeled jurisdiction of the federal courts" in treble damage cases (*Lyons, supra*) may be "frustrated or abandoned" (*Mach-Tronics, supra*) solely because Petitioner's state court lawsuit finished first and it desires to reap the fruit thereof.

B. Section 16 Of The Clayton Act "Expressly Authorized" The Preliminary Injunction Within The Meaning Of The First Exception To The Anti-Injunction Statute, 28 U.S.C. §2283.

In *Mitchum* v. *Foster,* 407 U.S. 225 (1972), this Court construed the "expressly authorized" exception to the Anti-Injunction Statute, 28 U.S.C. §2283. Petitioner concedes the importance of *Mitchum,* twice referring (Pet. 15, 16) to "the criteria" laid down therein for determining in what circumstances a statute will be held to have "expressly authorized" the grant of an injunction against a state proceeding. But Petitioner *nowhere states what those criteria are*—an omission, we submit, which underscores their applicability to the facts of this case.

Mitchum held:

> "The test, rather, is whether an Act of Congress clearly creating a federal right or remedy enforceable in a federal court of equity, could be given its intended scope only by the stay of a state court proceeding" (407 U.S. at 238).

Specific guidelines were articulated for application of this test:

(1) The federal statute "need not contain an express reference to [Section 2283]";

(2) the federal statute "need not expressly authorize an injunction of a . . . state court proceeding"; and

(3) the federal statute "must have created a *specific and uniquely federal right or remedy,* enforceable in a federal court of equity, *that could be frustrated if the federal court were not empowered to enjoin a state* court proceeding" (*Id.* at 239).

Manifestly, Section 16 of the Clayton Act meets these tests here. First, it is immaterial that Section 16 expressly refers neither to Section 2283 nor to state court proceedings. Second, as *Mitchum* noted with respect to Section 1983 of the Civil Rights Act, the Clayton Act "opened the federal courts to private citizens, offering a uniquely federal remedy" (407 U.S. at 239). Time and again this Court has emphasized that private antitrust suits are "not merely to provide private relief, but . . . to serve as well the high purpose of enforcing the antitrust laws." *Zenith Radio Corp.* v. *Hazeltine Research, Inc.,* 395 U.S. 100, 130-31 (1969). And such suits may be heard only in a federal forum (*supra* pp. 14-16).

Frustration of these federal rights is imminent here. The Court of Appeals said this was not merely "an appropriate case" for the interposition of federal equity powers but, indeed, "a classic example" of such a case. Not only do Petitioner's collection activities threaten to "thwart a federal antitrust suit"; in fact, the judgments it seeks to enforce are themselves the fruit of its antitrust offenses (Pet. App. 11).

Petitioner's misreading of *Mitchum* is mirrored in its treatment of other authorities supporting the injunction at bar (Pet. 14 fn.). The Court of Appeals thoroughly analyzed *United States* v. *Bayer,* 135 F.Supp. 65, 73 (S.D.N.Y. 1955) (quoted at Pet. App. 12), *Helfenbein* v. *Int'l Industries, Inc.,* 438 F.2d 1068 (8th Cir. 1971) (Pet. App. 11-12), and *Studebaker Corp.* v. *Gittlin,* 360 F.2d 692 (2d Cir. 1966) (Pet. App. 12-13), all of which Petitioner relegates to a footnote (Pet. 14 fn.).

The Court of Appeals' analysis of these authorities was correct. Although *Bayer* spoke of effectuating its judgment, in the light of *Mitchum* it is clear that *Bayer's* reasoning squarely supports the injunction here. For without it, Petitioner, like the defendant's assignee, would "acquir[e] . . . the fruits of the condemned project" (135 F.Supp. at 73).

Though *Studebaker* arose under the Securities Exchange Act, as Petitioner points out (Pet. 14 fn.), Judge Friendly's discussion of the Clayton Act was no mere "passing reference" but a fundamental step in the Second Circuit's reasoning. Obviously, the Court deemed Section 16 to "expressly authorize" an injunction, and particularly where, as here, "the very act of prosecuting the state proceeding violated" the antitrust laws (360 F.2d at 698).

And *Helfenbein* also supports the injunction at bar (Pet. App. 11-12). Relief was denied because there was no attempt in the state action "to enforce the very conduct . . . prohibited by the Clayton or Sherman Act" (438 F.2d at 1071), *which is the very point here.* To the same effect is *Red Rock Cola Co.* v. *Red Rock Bottlers,* 195 F.2d 406, 409 (5th Cir. 1952).

Petitioner ignores that injunctions against further prosecution of state court suits were also issued under Section 16 of the Clayton Act in *Philadelphia World Hockey Club, Inc.* v. *Philadelphia Hockey Club, Inc.,* 351 F.Supp. 462, 494, 514, 517-19 (E.D. Pa. 1972) and in *Katz Drug Co.* v. *Shaeffer Pen Co.,* 6 F.Supp. 212 (W.D. Mo. 1933).

In *Sar Industries, Inc.* v. *Monogram Industries, Inc.,* (CCH 1976-1 Trade Cases, ¶60,816, at p. 68,523 (C.D. Cal. 1976)), the District Court based its jurisdiction to issue an injunction upon *Mitchum* and upon the District Court opinion in this case (Conclusion of Law No. 13). *Sar* held that "The prosecution of the state court action, as part and parcel of the scheme to violate the Sherman Act [as here], itself constitutes a violation of the Sherman Act," citing *Mach-Tronics, Inc.* v. *Zirpoli,* 316 F.2d 820 (9th Cir. 1963) and the District Court's opinion here (Conclusion of Law No. 14(g)).

Thus, Petitioner's claim that "no court had ever held" that Section 16 of the Clayton Act expressly authorized federal injunctions against state court proceedings (Pet. 12) is unfounded.

None of the cases Petitioner cites as having "uniformly held" that Section 16 does *not* expressly authorize injunctions against state proceedings (Pet. 12) or as having created a "clear conflict between the Circuits" (Pet. 13-15)

come within gunshot of this case. Not one of them involved an attempt to make the courts a party to the carrying out of one of the very restraints forbidden by the Sherman Act. See *Continental Wall Paper Co.* v. *Louis Voight & Sons Co.*, 212 U.S. 227, 261 (1909), cited by the District Court (Pet. App. 31). Nor did any of Petitioner's cases involve the imminent threat of frustration of "a specific and uniquely federal right" that Petitioner's collection activities posed here—where the Clayton Act "could be given its intended scope *only* by the stay of a state court proceeding" (*Mitchum*, 407 U.S. at 237-38).

As Judge Friendly put it, Petitioner's cases are distinguishable in that they rest "on the ground that the prosecution of the state court action sought to be enjoined would involve no 'violation of the anti-trust laws'" (*Studebaker*, 360 F.2d at 698); those cases do not apply "where the very act of prosecuting the state proceeding violated federal law" (*Id.*). And the District Court in *Lyons* v. *Westinghouse Electric Corp.* (Pet. 13) expressly recognized that an injunction would lie when "such restraint is absolutely necessary to preserve the integrity of the Federal court's jurisdiction" (109 F.Supp. at 925).

Amalgamated Cothing Workers (Pet. 16), *Potter* (Pet. 12 fn., 14), *Reines* (Pet. 12 fn.), *Bascom* (*Id.*), *Avon Publishing* (*Id.*), *American Manufacturers* (*Id.*), *Carter* (Pet. 12 fn., 13), *T. Smith & Son, Inc.* (Pet. 16) and *Vernitron* (*Id.*) are all inapposite. In none of them was there any showing that federal antitrust claims would be thwarted absent equitable relief or that federal law proscribed the precise conduct sought to be enjoined.

C. The Preliminary Injunction Was Also "Necessary In Aid Of" The District Court's Jurisdiction Within The Meaning Of The Second Exception To The Anti-Injunction Statute, 28 U.S.C. §2283.

Having decided that the "as expressly authorized" exception to the Anti-Injunction Statute applied, the Court of Appeals deemed it unnecessary to reach the question whether the preliminary injunction was justified under the "in aid of jurisdiction" exception to Section 2283 (Pet. App. 8), as the District Court had also held (Pet. App. 34).

The District Court's decision with respect to the second exception was fully justified. It found:

> "(C)ollection of the state judgment will effectively place Lektro-Vend in the hands of—or at least at the disposition of—Vendo. Stoner Investments is controlled by Mr. Stoner; 78.57% of Lektro-Vend is owned by Stoner Investments . . . Continued collection thus would eliminate two of the plaintiffs herein. Moreover, Mr. Stoner's ability to effectively prosecute this action would be severely limited by further execution of the state court case" (Pet. App. 31-32).

Reciting the relevant facts, it held that:

> ". . . §2283 authorizes an injunction here because further collection efforts would eliminate two plaintiffs, Stoner Investments and Lektro-Vend Corp., as parties under the case or controversy provisions of Article III since they would necessarily be controlled by Vendo. Vendo's offer to place the Stoner Investment and Lektro-Vend stock under control of the Court does not meet this problem because as a matter of substance Vendo would control both plaintiff and defendant, requiring dismissal under Article III. Thus the injunction is also necessary to protect the jurisdiction of the Court" (Pet. App. 34).

Atlantic Coast Line R. Co. v. *Brotherhood of Locomotive Engineers,* 398 U.S. 281, 295 (1970), described the applicability of the "in aid of jurisdiction" exception as follows:

> "[W]e conclude that it implies something similar to the concept of injunctions to 'protect or effectuate' judgments. Both exceptions to the general prohibition of §2283 imply that some federal injunctive relief may be *necessary to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case.*"

Here Petitioner seeks not merely "to seriously impair the . . . flexibility and authority" of the District Court to adjudicate Respondents' federal antitrust claims; indeed, it seeks to "eliminate two of the plaintiffs herein" and to "severely limit" the third plaintiff's "ability to effectively prosecute this action" (Pet. App. 32).

In *Philadelphia World Hockey Club, Inc.* v. *Philadelphia Hockey Club, Inc.,* 351 F.Supp. 462, 510 (E.D. Pa. 1972), the court enjoined a state proceeding, saying:

> "The operation of the antitrust laws need not be delayed until one is trying to almost resurrect the dead; these laws are designed to preserve living competitors."

And in *Milsen Co.* v. *Southland Corp.,* 454 F.2d 363, 366-67 (7th Cir. 1971), preliminary relief was awarded because the plaintiffs "may not be able to finance the trial on their legal claims if they lose their businesses now"—precisely the situation at bar, as the District Court held, citing *Milsen* (Pet. App. 32).

Further, since this is an antitrust treble damage action, Respondents have invoked a jurisdiction which Congress conferred exclusively upon the federal court (*supra* pp. 14-16). They sue "not merely to provide private relief, but

. . . to serve as well the high purpose of enforcing the antitrust laws" (*Zenith, supra* p. 17; Pet. App. 32). Upon the facts at bar, the need to preserve untrammeled federal jurisdiction is paramount.

II.

THE PRELIMINARY INJUNCTION DOES NOT OFFEND PRINCIPLES OF COMITY AND FEDERALISM.

The Court of Appeals said:

> "The principle of comity has no applicability when the exclusive remedy for an injury lies in the federal court. We are in agreement with the trial court's observation:
>
> > "Principles of comity and federalism do not prevent the issuance of an injunction considering the peculiar nature of this case. The federal action here is based in part on the very proceeding sought to be enjoined. If federal law is violated by continuation of the state action the paramount national interest requires court intervention.'" (Pet. App. 14).

Petitioner misstates this as a "sweeping" (Pet. 10) holding that "brush[es] aside principles of comity and federalism" (Pet. 20) solely on the basis that Section 16 of the Clayton Act confers equitable jurisdiction only on the federal courts (Pet. 19). Quite the contrary, in upholding the award of preliminary relief, the Court below expressly adopted the finding of the District Court with regard to "the peculiar nature of this case", namely, that it "is based in part on the very proceeding sought to be enjoined" (Pet. App. 14).

Nor did Respondents invoke the exclusive federal antitrust jurisdiction *solely* for purposes of seeking an equitable remedy—as if the purpose of this lawsuit were mere-

ly "to forestall collection of the judgments" (Pet. 10). Rather, Respondents are pursuing *antitrust treble damage claims*. Injunctive relief was also sought and required in order that those claims could have a meaningful trial on their merits.

Citing *Continental Wall Paper* v. *Louis Voight & Sons, Co.*, 212 U.S. 227, 261 (1909) (Pet. App. 31), the District Court found that Petitioner's collection activities furthered the precise conduct violative of the antitrust laws. This fact alone renders inapplicable all of Petitioner's cases, each of which involved state suits on claims collateral to any antitrust violation.*

Throughout its argument (Pet. 8, 11, 18, 19, 21, 23), and principally under "comity and federalism," Petitioner refers to the "withdrawal" of the federal antitrust defense in the state proceedings. Petitioner omits to state that this issue was raised in the Court of Appeals under the heading of "waiver" and that the Court of Appeals held it could

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* Petitioner's footnote argument (Pet. 21 fn.) that the Illinois Supreme Court's judgments are "independent of the noncompetition covenants" is in the teeth of the District Court's contrary findings (*supra*, pp. 10-11). Petitioner challenged these findings below, but the Court of Appeals affirmed them (Pet. App. 15-16), noting the "narrow" scope of review in light of the District Court's discretion (*Id.* at 15). Thus the footnote citations of *Response*, *Helfenbein*, *Mullis* and *Kelly* are inapposite since the threatened injury here was a direct result of the antitrust violation.

Singer belongs neither in Petitioner's footnote nor anywhere else in this case. It turned on the "unclean hands" doctrine. But after *Perma Life Mufflers* v. *Int'l Parts*, 392 U.S. 134, 138-41 (1968), *in pari delicto* no longer bars a federal antitrust action. Moreover, *Singer* was only an action for declaratory relief so that the exclusive jurisdiction of the federal courts to redress antitrust treble damage claims was not there invoked.

not be considered on appeal since it was not presented to the District Court (Pet. App. 16).

The Court of Appeals further held that Petitioner's procedural contentions—including this one—were "without merit" (Pet. App. 16). For good reason. First, Lektro-Vend was never a party to the state proceedings. Petitioner's counsel specifically acknowledged this before the District Court (Resp. App. 6). Further, the federal antitrust defense was dismissed in the state courts on April 29, 1971, without prejudice, and *without objection by Petitioner* (Resp. App. 2; *supra* p. 9 fn.).

Moreover, Respondents sought preliminary relief on the basis of numerous actionable facts—involving Petitioner's misuse of the state judicial process—which were not in existence when the defense was withdrawn. In 1971 District Judge McGarr (before whom the case was then pending) held that this case "encompasses issues which are broader than any presented in the anti-trust defense" and that "plaintiff cannot be precluded from asserting its antitrust cause of action in the federal court" (Resp. App. 3).

Petitioner's "waiver" argument also overlooks the applicable law. Petitioner cites Judge Learned Hand's opinion in *Lyons* (Pet. 18, *supra* pp. 14-15) as authority for the "well settled" proposition that state courts have jurisdiction to adjudicate federal antitrust defenses to state law claims. But Petitioner entirely misses the thrust of *Lyons*, which held that the jurisdiction of federal courts to adjudicate private antitrust treble damage claims is "untrammeled" by state court decisions, at least in cases like this one where "the putative estoppel includes the whole nexus of the facts that make up the wrong" (222 F.2d at 189). Accordingly, the Second Circuit permitted the plain-

tiff in *Lyons* to pursue his federal antitrust claims in federal court despite the fact that *those issues were raised by way of defense in the state court and were held without merit* (*Id.* at 185, 189).

Mercoid Corp. v. *Mid-Continent Investment Co.*, 320 U.S. 661, 671 (1944), held that a federal defendant could pursue a federal antitrust counterclaim in a federal case even though the illegal activity alleged as part of that claim had not been raised in defense of a prior related litigation involving the same parties. Citing the public interest embodied in the federal antitrust laws, this Court declared that "the determination of that policy is not 'at the mercy of' the parties . . . nor dependent upon the usual rules governing the settlement of private litigation" (320 U.S. at 670).

Conceding *arguendo* that the principles of comity and federalism mandated in *Younger* (Pet. 10) for criminal cases and extended in *Huffman* (*Id.*) to §1983 civil rights cases apply in all federal civil proceedings, including antitrust cases, those principles must yield in *"extraordinary situations"* where the state proceeding sought to be enjoined was being conducted *in bad faith* or with *an intent to harass* and where the *injury would be "great and immediate"* (*Younger,* 401 U.S. at 46, 54; *Huffman,* 420 U.S. at 601-02)—precisely this case, as the District Court found.

Petitioner's citations of this Court's decisions with respect to federal relitigation of constitutional issues in *habeas corpus* and civil rights cases (Pet. 19, 21) are inapposite. The trial of this case was inevitable, no matter what the outcome of the state proceedings or what issues were litigated therein (*supra* pp. 14-16). Anything less would defeat the salutary paramount public policy underlying the Sherman and Clayton Acts and the statutory scheme which invests exclusive jurisdiction in the federal courts to enforce those Acts.

III.

THE DISTRICT COURT DID NOT REVERSE, REVIEW OR REVISE THE ILLINOIS SUPREME COURT'S DECISION NOR DID THE COURT OF APPEALS SANCTION ANY SUCH REVIEW. NO EXERCISE OF THIS COURT'S POWER OF SUPERVISION IS CALLED FOR.

Denying Respondents' claim under the Civil Rights Act (Count II of the amended & supplemental complaint), the District Court held that it lacked "power to directly review cases from state court" (Pet. App. 19 n.1). But the District Court recognized that Count I (the federal antitrust count) included the distinct claim that the state proceedings were prosecuted by Petitioner in violation of Sections 1 and 2 of the Sherman Act (Pet. App. 20). In passing upon Respondents' antitrust claims, the District Court did *not* review the correctness of the Illinois Supreme Court decision upon the matters before it, saying:

> "The Court proposes to examine these proceedings only insofar as they may reflect illegal anticompetitive conduct by Vendo" (Pet. App. 23);
>
> and
>
> ". . . the state proceedings must be examined by this Court for the purpose of determining whether Vendo prosecuted those cases as part of an anticompetitive scheme" (*Id.* at 25).

The Court of Appeals quoted and approved what the District Court said (Pet. App. 14).

Obviously, what the District Court reviewed was not the judgment of the Illinois Supreme Court but the conduct of

Petitioner. There was no "fight . . . for control of a particular case" (Pet. 22) nor was "the correctness of fact conclusions" (*Id.*) in dispute. Rather, Respondents charged, and the District Court found, that Petitioner's entire Illinois state court litigation, among others, was undertaken and prosecuted to enforce contracts which unreasonably restrained trade and as a part of a scheme to impede and eliminate competitors. As District Judge McGarr held herein in 1971, Respondent's "allegations in this suit *transcend* the allegations in the state court suit" (Resp. App. 3). Even Petitioner's counsel admitted, after the Illinois Supreme Court's decision, that the parties were to make a "fresh" start in *this* case (Resp. App. 8).

This was the point of Judge Hand's opinion for the Second Circuit in *Lyons* (*supra* pp. 14-15) when he stated that federal courts in treble damage cases have "an immunity of their decisions from any prejudgment elsewhere" and that this "immunity" exists "at least on occasions . . . where the putative estoppel includes the whole nexus of facts that make up the wrong" (222 F.2d at 189)—the case here. And as the Ninth Circuit held in *Mach-Tronics, Inc.* v. *Zirpoli*, 316 F.2d 820, 830 (1963):

> "We do not see any way in which [the District Court] could avoid coming to grips with the contention made in the treble damage complaint that the action was brought in the state court for the purpose of giving effect to Ampex's unlawful monopolistic scheme. Even if it were found that Mach-Tronics and its employees have been guilty of stealing the secrets and processes of Ampex, that would not avoid or otherwise dispose of Mach-Tronics' treble damage case if the latter succeeds in establishing these allegations of its complaint. . . ."

CONCLUSION

Petitioner ignores that on uncontroverted facts it has been found *prima facie* guilty of an attempt "to thwart a federal antitrust suit by the enforcement of state court judgments which are alleged [and found] to be the very object of antitrust violations" (Pet. App. 11; *supra* pp. 10-11). It complains that the Chancellor's writ staying the consummation of its illegal objective is an "insult to the processes of a state judicial system" (Pet. 21); that it would sanction widespread "frustrat[ion] and interfere[nce] with . . . state court proceedings" (Pet. 24). This rhetoric ill becomes one who seeks the fruits of its misuse and abuse of that state judicial process by denying the recipients of that misuse and abuse their day in court in the only tribunal empowered to give those recipients the relief they justly deserve.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

Additional Statutes Involved

Section 1 of the Sherman Antitrust Act, 15 U.S.C. §1, provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. • • •

Section 2 of the Sherman Antitrust Act, 15 U.S.C. §2, provides in pertinent part:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor. • • •

Section 4 of the Clayton Act, 15 U.S.C. §15, provides:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

APPENDIX B

Excerpt from Transcript of Proceedings Before Illinois Circuit Judge John S. Petersen on April 29, 1971, in *Vendo* v. *Stoner, et al.*

3001-3002 (Trial hearings before Judge John S. Petersen began April 29, 1971).

3003 (Pursuant to notice previously served on plaintiff's attorneys, Mr. Sheridan moved to dismiss without prejudice defendants' sixth affirmative defense as amended, that is, the federal anti-trust defense. There being no objection, the Court entered its order that the motion be granted.)

APPENDIX C

Memorandum Opinion of United States District Judge Frank J. McGarr, Dated October 21, 1971, in *Lektro-Vend et al.* v. *Vendo*

This is a complex anti-trust case involving allegations of monopoly and restraint of trade. 15 U.S.C. Sections 1 and 2. Plaintiffs Stoner and Stoner Investments are defendants in a state court breach of contract suit filed by the defendant Vendo. As an affirmative defense to the state suit, Stoner and Stoner Investments claimed that the contract sued on violated the anti-trust laws. The state court struck

the defense, but was reversed. *The Vendo Co.* v. *Stoner,* 105 Ill. App.2d 261, 296-97 (1969). After this decision was rendered, Stoner withdrew the defense in the state court. The case presently before this court encompasses issues which are broader than any presented in the anti-trust defense.

This court was concerned about the res judicata implications of the state breach of contract suit vis-a-vis the federal anti-trust issues, and asked the parties to brief the question. It is clear that the plaintiff cannot be precluded from asserting its anti-trust cause of action in the federal court. The allegations in this suit transcend the allegations in the state court suit, and the relief sought is more extensive. A less obvious determination is whether the plaintiffs are now precluded from offering as an element of damages any part of a possible state court award. The court is now satisfied, based in large part on its own research, that the two causes of action involved here are sufficiently dissimilar to negate any application of the doctrine of res judicata.

Enter:

/s/ Frank J. McGarr
United States District Judge

Dated: October 21, 1971

APPENDIX D

Transcript of Proceedings Before United States District Judge Richard W. McLaren on October 1, 1974, in *Lektro-Vend et al.* v. *Vendo*

IN THE
UNITED STATES DISTRICT COURT
Northern District Of Illinois
Eastern Division

LEKTRO-VEND CORPORATION, a Delaware Corporation, HARRY B. STONER, and STONER INVESTMENTS, INC., a Delaware Corporation,

Plaintiffs,

vs. } 65 C 1755

THE VENDO COMPANY, a Missouri Corporation,

Defendant.

Transcript of proceedings had in the above-entitled cause before Hon. Richard W. McLaren, one of the Judges of said Court, sitting in his courtroom in the United States Courthouse at Chicago, Illinois, on Tuesday, October 1, 1974, at 10:00 a.m.

Present:

Mr. Barnabas F. Sears and
Mr. James E. S. Baker,
on behalf of plaintiffs;

Mr. Lambert M. Ochsenschlager,
on behalf of defendant.

The Clerk: 65 C 1755, Lektro-Vend Corporation v. The Vendo Company. For report on status.

Mr. Ochsenschlager: Lambert Ochsenschlager from Aurora representing the defendant, The Vendo Company.

Mr. Sears: Barnabas Sears, and this is Mr. James Baker. We represent the plaintiffs in the case and the defendants in the other case.

The Court: Well, gentlemen, I am sure we have here the oldest case in the building.

Mr. Ochsenschlager: I beg your pardon, your Honor? I am a little hard of hearing.

The Court: I say I am sure we have here the oldest case in the building.

Mr. Sears: I am not surprised at that, I guess, your Honor, in light of the litigation that we have had. I suppose that one of us ought to report to you the fact that the Supreme Court handed down an opinion last Friday finding in favor of Mr. Ochsenschlager's client and against Mr. Baker's and my clients, and no passing on the question of validity of the non-competitive covenants of either the sales contract or the employment contract.

And entirely apart from that, of course, you ought to consider the fact that losing counsel is speaking, I think the opinion, itself, really raises more questions than it settles. It is a substantial amount, and we propose, of course, to file a petition for rehearing and exhaust that, and having exhausted that, we think the two constitutional questions involved in the case might merit consideration by the Supreme Court on certiorari.

So that is about all we have to report. I think outside of my conclusionary remarks about the opinion, I guess I have stated it accurately.

Isn't that right?

Mr. Ochsenschlager: Well, yes, but most of it was conclusionary.

I do believe that it did refer to the "non-compete" agreement, but it said, in addition, there was a breach of fiduciary duty. I don't want to take up your time on that, but they found in our favor, and affirmed the trial court where the amount of the award was over seven and a half million dollars.

The opinion was written by Justice Schaefer, and if it would help enlighten your Honor anything about what we have been troubling the Court with, and being in here all of these years, we would like to leave a copy of the opinion with you if you would care to see it.

The Court: I would be glad to have it for the file. I doubt that I will start studying it 24 hours a day right at the present time.

You are going to be applying for rehearing in the Supreme Court?

Mr. Sears: Yes, we are, your Honor. We have 21 days within which to do that, and then, of course, if we file, after that, there is an automatic stay of mandate until the petition for certiorari has been passed on.

Mr. Ochsenschlager: At the appropriate time, we may come in with some other motion for summary judgment if we, based upon this decision at least as to part of the plaintiffs, if not all of them in this case—Lektro-Vend was not a party in the state case, but the other two plaintiffs were—and it may mean some further motions in that regard.

We think, speaking for ourselves, that the Supreme Court pretty well finalized all of the many issues involved. It is a very lengthy opinion, and it is pretty inclusive.

The Court: How long would you expect it would be before they would rule on the motion for rehearing?

Mr. Sears: Well, that varies, your Honor. Sometimes they don't pass on them until the succeeding term which would be the November Term, sometime during the first week of the November Term.

I have known them to pass on them between the terms, so I couldn't tell your Honor with any degree of accuracy precisely when they would pass on this petition.

We filed 21 days from last Friday. They come in the second Monday of November.

The Court: I take it it is obvious that if any part of this Supreme Court opinion stands up, it disposes of some of the issues in the case that we have here?

Mr. Sears: I don't know. I can't say, your Honor. I don't think it does because one of the principal issues here before your Honor is the question of the validity of the sales contract and the contemporaneous, relatively contemporaneous, employment contract which we claim violates the Sherman Act, and with respect to which no interpretation by a state court, assuming that they interpreted the statute, which I don't believe they did; maybe I misread the opinion—but in any event, any interpretation by a state court of a federal statute, while it might be entitled to weight before your Honor, depending upon the persuasiveness of the reasoning, it certainly wouldn't be binding upon a Federal Court.

The Court: This is an interpretation by the Illinois Court of the federal statute?

Mr. Sears: No.

The Court: No?

Mr. Baker: No, this is a holding as to the validity of these covenants not to compete under the Illinois common law. They refused to apply the Illinois anti-trust law, and as your Honor stated a couple of times in our conferences

in chambers, the validity of these covenants and the actions of the defendant, Vendo, toward the plaintiffs, Stoner, the anti-competitive acts, are a matter to be determined strictly under federal law.

I think I have said to your Honor before, if the State Court holds the covenants invalid, that is very significant in this case, but if the State Court holds them valid, we start afresh here and determine their validity under the federal law.

The Court: And that is where we are now—

Mr. Baker: Yes, sir.

The Court: —you are saying.

Mr. Baker: Yes, sir.

Mr. Ochsenschlager: Yes, we are fresh.

If the Court please, it might be that a pretrial conference sometime to get, really, the contentions of the parties clear might be of some help, I don't know.

The Court: I would guess that the likelihood of the Court granting rehearing in a case like this after it has had it as long as it had—in fact, it has been up there twice, hasn't it?

Mr. Sears: No, they didn't have it very long at all. The Supreme Court has had it once.

Mr. Baker: We argued May 23d, and the decision was filed last Friday.

It has been to the Appellate Court of Illinois twice, and the action, I believe, is here.

Mr. Ochsenschlager: The Supreme Court reversed the Appellate Court and affirmed the judgment granted in the trial court.

The Court: Let's set it down for a pretrial conference. We have got to do something with this thing. We can't just let it sit here. Let's set it down for a month or so from

now after you have a chance to analyze just what happened and what is left in this case that we have before us.

Suppose we set it down for 1:30 in the afternoon on November 7.

Mr. Ochsenschlager: Thank you.

The Court: November 7 at 1:30 p.m.

Mr. Sears: Thank you, your Honor.

CERTIFICATE

I hereby certify that the foregoing 7 pages constitute a full, true and correct transcription of shorthand notes taken upon the hearing of the above-entitled cause before Hon. Richard W. McLaren, one of the Judges of said Court, on October 1, 1974.

/s/ Agnes M. Thorne
Assistant Official Court Reporter to
Dorothy L. Rasoul
Official Court Reporter
United States District Court
Northern District of Illinois